No. 83-1862

In The
Supreme Court of the United States
October Term, 1984

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

PETITIONER'S REPLY MEMORANDUM

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TABLE OF CASES

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I

There is no merit to respondents' argument in their memorandum opposing certiorari (pp. 2-4), that petitioner did not timely present to State courts of the State of New York a federal constitutional question whether respondents violated petitioner's federal constitutional right to a procedural due process evidentiary hearing by revoking his license as a teacher of homebound children without a hearing of evidence of disputed factual issues whether petitioner had the qualifications for such license prescribed by

respondents' by-laws, and by their announcement of examination for such license.

In our petition for certiorari (p. 6) we said that pursuant to a collective bargaining contract between petitioner's labor union and the respondent school board, such labor union demanded arbitration of a grievance, claiming that the school board unreasonably revoked petitioner's teaching license for alleged failure timely to complete required courses of study, although petitioner was fully qualified and had obtained a permanent State certificate of qualification as a teacher of homebound children (Record, p. 157); and that such demand for arbitration was pending, undecided, on May 11, 1984, when we filed our petition for certiorari.

A demand for arbitration by the United Federation of Teachers demanded arbitration "concerning the Board's refusal to assign grievant to a teaching position"; and the remedy sought was "A finding that Articles Twenty and Twenty-one have been violated, and, further, a directive that grievant be assigned to teach and compensated for the entire period during which the Board has refused to permit him to work."

The demand for arbitration further stated:

> "Pursuant to Article Seventy-Five of CPLR unless you apply to stay the arbitration within twenty days after service of this notice upon you, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with, and from asserting in court the bar of a limitation of time."

The school board made no application to stay arbitration. Pursuant to CPLR 7503, the school board was barred from seeking to stay arbitration after expiration of the twenty day period.

The above-quoted statement is similar to the provisions in CPLR 204(b) that the time during which an arbitration proceeding is pending shall not be counted as part of the time elapsed for statute of limitations purposes.

The Trial Court's decision stated (188-190):

> "* * * a statute of limitations does not begin to run until after completion of the grievance procedure (Whitley v. Board of Education, 65 A.D.2d 821, 410 NYS2d 345 (2d Dept. 1978)."

In this case, the May 18, 1984 agreement between the school board and the labor union terminated the pending arbitration about the revocation of petitioner's teaching license and his demand for reinstatement, and should be deemed equivalent to a completion of the grievance procedure under the *Whitley* case, *supra*.

On May 18, 1984, the school board and the labor union signed an agreement whereby the labor union agreed "not to support Mr. Lubin in any outstanding grievances now pending at any step of the grievance procedure."

On May 18, 1984, there was outstanding a grievance filed by petitioner's labor union, the United Federation of Teachers, whereby the labor union demanded arbitration of a grievance "concerning the Board's refusal to assign grievant to a teaching posi-

tion."

Such agreement between the respondent school board and petitioner's labor union was made without notice to petitioner, without petitioner's consent, and it was contrary to petitioner's interest.

The above quoted agreement was a supervening change in the facts, which occurred after the New York Court of Appeals made its decision on December 1, 1983, affirming the dismissal of the petition as barred by the four month statute of limitations in CPLR 217.

In the exercise of its appellate jurisdiction, this Court has the power to make such disposition of this case as justice requires in the light of this change in the facts, which this Court may consider in its decision of this case. *Patterson v. Alabama*, 294 U.S. 600 (1934); *Herndon v. Georgia*, 295 U.S. 441 (1934); Moore, Federal Practice, Supreme Court Practice, vol. 12, pp. 8-59 to 8-63.

We ask this Court to reverse the judgment dismissing the petition, and to remand this case to the New York courts, with directions that the parties shall proceed to arbitrate the grievance which petitioner's labor union filed on his behalf.

II.

In their memorandum (p. 2, footnote) respondents also argued that application of the three-year statute of limitations in CPLR 214(2), instead of the four month statute of limitations in CPLR 217, would not help the petitioner, because he commenced this suit on

July 2, 1980, more than three years after the school board notified him that his license would be revoked and his employment would be terminated on June 30, 1976.

In our petition for certiorari we cited *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1979) that federal courts are required "to apply the New York rule for tolling that statute of limitations"; and that in arbitration cases, CPLR 204(b) provides that the statute of limitations is tolled during the time between the service of a demand for arbitration and the date of a final judgment that arbitration is not available. In this case, by analogy, CPLR 204(b) should be applied to the agreement of May 18, 1984 by respondents and the United Federation of Teachers, terminating the pending arbitration proceeding by agreeing "not to support Mr. Lubin in any outstanding grievances now pending at any step of the grievance procedure."

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

Dated: June 27, 1984